

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

WASIM HUSAM WADIE,

Defendant-Appellant.

UNPUBLISHED
February 25, 2003

No. 230350
Oakland Circuit Court
LC No. 98-164107-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MANHAL WADIE,

Defendant-Appellant.

No. 230351
Oakland Circuit Court
LC No. 98-164106-FC

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendants Manhal Wadie and Wasim Husam Wadie were tried jointly before the same jury. Defendant Manhal Wadie was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, and sentenced to two concurrent terms of eight to twenty years' imprisonment. Defendant Wasim Husam Wadie was convicted of one count of first-degree criminal sexual conduct and sentenced to a term of eight to twenty years' imprisonment. Both defendants appeal as of right. We affirm as to Manhal Wadie (Docket No. 230351); we remand as to Wasim Husam Wadie (Docket No. 230350).

According to the complainant, four young men, including defendants, forced her into their car after she met and danced with them at a local teen club. The complainant testified that she was forced to perform fellatio on all four of her assailants and vaginal intercourse with defendant Manhal Wadie before she was dropped off again at the club. The complainant suffered bruising and swelling on her mouth, chest, throat, hard palate, and vaginal area. Each defendant alleged that the sexual conduct was consensual and initiated by the complainant.

On appeal, defendant Manhal Wadie argues that the statement he made at the police station was the product of an illegal arrest. Although the trial court suppressed a statement that Manhal Wadie made at the scene of the investigatory stop, it admitted his subsequent statement because, by that time, he had been implicated by the statements of his brother, defendant Wasim Wadie. As defendant acknowledges, this Court held in *People v Lambert*, 174 Mich App 610, 618; 436 NW2d 699 (1989), that “where the police have unlawfully stopped or detained a citizen and then discover that the person detained is the proper subject of a lawful arrest on grounds other than the original illegal stop, the police may make the arrest and any evidence obtained as a result of the lawful arrest is admissible.” Accordingly, we find no error.

Both defendants assert that the trial court erred in denying their pretrial motion to suppress identification testimony on the basis that they were denied counsel at a post-arraignment photo identification procedure. The trial court suppressed evidence of the identification procedure but found that there was an independent basis for the complainant’s identification testimony at trial. Even where a pretrial identification procedure is unduly suggestive, the identifying witness’ testimony may be allowed if there is an independent basis for the in-court identification. *People v Kurylczuk*, 443 Mich 289, 303, 309; 505 NW2d 528 (1993). We review the trial court’s decision to admit identification testimony for clear error. *Id.*

Although the trial court declined to hold an evidentiary hearing on the question of an independent basis for an in-court identification, we conclude that any error in this regard was harmless. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996). First, there is sufficient evidence on the record to establish that the complainant had an independent basis for her identification of defendants. *People v Kachar*, 400 Mich 78, 100; 252 NW2d 807 (1977). Specifically, before the alleged sexual assaults, the complainant danced for fifteen or twenty minutes with a group of young men that included defendants and defendant Manhal Wadie gave her his pager number. Moreover, we note that victims of sexual assault “usually have a better opportunity to observe their assailants than victims or witnesses of other crimes.” *People v Gray*, 457 Mich 107, 117; 577 NW2d 92 (1998). Second, as defendants acknowledge, identification was not at issue in this case in light of defendants’ claims that the sexual activity was consensual.

Next, both defendants argue that they were denied a fair trial because defense witness Wasim Hassan was asked during cross-examination whether he lied to the police about his age and whether he refused to make a statement. Hassan, a juvenile, was one of the other alleged assailants implicated in the assault. Defendants asked for a mistrial on this basis. The trial court ruled that the questions were proper because Hassan had previously been acquitted of the charges and, therefore, had no Fifth Amendment privilege to assert. Hassan testified that he and defendants had consensual sex with the complainant.

We review the trial court’s decision regarding the admission of evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). The prosecutor concedes on appeal that it was error to ask Hassan about his failure to make a statement after being read his *Miranda*¹ rights. See *People v McReavy*, 436 Mich 197, 217-220; 462 NW2d 1

¹ *Miranda v Arizona*, 384 US 436, 477; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(1990). Nonetheless, reversal is not warranted because we conclude that the error was harmless beyond a reasonable doubt. *People v Anderson* (After Remand), 446 Mich 392, 406; 521 NW2d 538 (1994). The prosecutor's questions were limited to eliciting a "yes" or "no" answer and did not elicit a comment regarding Hassan's exercise of his constitutional right. See *People v Truong* (After Remand), 218 Mich App 325, 336-337; 553 NW2d 692 (1996). Further, the testimony was not mentioned in the prosecutor's closing argument. Additionally, the questions did not elicit any testimony undermining defendants' claims that the sexual activity was consensual. Under these circumstances, the error was harmless beyond a reasonable doubt. Defendants were not deprived of a fair trial.

Affirmed as to defendant Manhal Wadie.

In Docket No. 230350, defendant Wasim Husam Wadie argues that statements and evidence obtained as a result of his detention and questioning should be suppressed as the fruits of an illegal arrest. We review a trial court's ruling on a motion to suppress for clear error. *People v Stevens* (After Remand), 460 Mich 626, 631; 597 NW2d 53 (1999). Defendant specifically contends that the investigative stop and detention in this case became a "de facto arrest." The trial court considered this question after an evidentiary hearing and denied defendant's motion to suppress. The testimony showed that the police identified a white car at the teen club registered to Manhal Wadie's address and then began surveillance of the car after tracing the pager number that Manhal Wadie had given to the complainant. After stopping the car, seventeen-year-old Wasim Wadie waived his *Miranda* rights and admitted that he and Manhal Wadie had sexual contact with the complainant. Both defendants were handcuffed and taken to the police station. At the police station, defendant Wasim Wadie again waived his *Miranda* rights and made a written statement. Defendant told the police where to find the condoms that were used during the incident and said the complainant had not consented.

The trial court found that the initial stop of the white vehicle was reasonable and the information obtained from Wasim Wadie during the investigatory stop provided probable cause for his arrest. The trial court also found that Wasim Wadie's statements were voluntary and the evidence of the condoms was admissible. Defendant does not contest that the investigatory stop was reasonable. We agree that the totality of the circumstances provided reasonable suspicion to support the stop of the car, which was registered to the same address as Manhal Wadie, whose pager number was given to the complainant, who in turn reported a forcible gang rape. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Defendant argues, however, that his detention in handcuffs, prior to his statement, was unreasonable. Defendant acknowledges that handcuffs do not necessarily create a de facto arrest but argues that their use was unreasonable in this case. We disagree. Considering that the police were investigating a serious felony, their decision to handcuff and separate the vehicle's occupants for their safety and to question them individually was not unreasonable. The police worked quickly to confirm their suspicions and placed defendant Wasim Wadie under arrest as soon as he answered their questions. *People v Chambers*, 195 Mich App 118, 122-123; 489 NW2d 168 (1992). Under the circumstances, the stop and detention was reasonable and the trial court did not err in denying Wasim Wadie's motion to suppress his statement and evidence of the condoms. *Id*

Defendant Wasim Wadie also argues that the trial court abused its discretion in failing to order a forensic referral given that record evidence suggested he was unable to assist in his own defense. We agree and remand for a nunc pro tunc competency hearing.

Several sidebar conferences were held before and after the jury was sworn regarding defendant's bizarre behavior in the courtroom and its potential impact on the jury. On the morning trial began, before voir dire, the trial court commented to defense counsel "Does your Defendant find something amusing here?" after which there was a sidebar conference. On the second day of trial, before opening statements were completed and before any testimony was heard, the prosecution brought an emergency motion to revoke Wasim Wadie's bond, based on his allegedly having thrown rocks at the complainant's family the afternoon before in the courthouse parking lot.

Before the bond revocation hearing, defense counsel requested a forensic referral several times, noting to the trial court that defendant's behavior and speech were bizarre and that defendant did not appear to understand or to be able to control his behavior in the courtroom. The court preliminarily determined defendant was competent and proceeded to conduct the bond revocation hearing. The prosecutor called several witnesses during the bond revocation hearing, after which defense counsel called defendant Wasim Wadie. Defendant's testimony included statements that he could not breathe, that he had never seen the complainant's family (the Zantops), that the Zantops communicated with him through ecstasy, and that he heard voices in his brain.

At the close of the bond hearing, defense counsel renewed his request for a forensic referral, noting that defendant was "decompensating," and that defendant's "responses on the stand suggest there is something going on his [sic] thought processes that needs clear attention." The prosecution argued that defendant was competent and that defendant's "bizarre behavior is not an issue, there's no medical as to that." The trial court revoked defendant's bond. Following a recess, defense counsel advised the court that records of defendant's most recent psychiatric treatment were to be delivered to the court that day:

Mr. Goldberg: Your Honor, since the break, I've had an opportunity to call the earlier treating physician, and he has not treated my client for a period of a couple of months. It is my understanding that he wasn't compensated adequately to insurance [sic], in terms of he had been treating with my client.

I think that to some instance it had to do with the loss of the green card that was part of the Court file that he needed to submit. He had insurance coverage, I think ultimately, that may have been part of it.

In any event, he did not know the name of the new treating physician. I think there was a referral for community mental health.

The Court: He's not willing to write a note.

Mr. Goldberg: He's not willing to.

The Court: I see.

Mr. Goldberg: Next, I got a hold of, just in the last few minutes, the name of the practice that is treating Mr. Wadie, it's called Pioneer Counseling. It's on Orchard Lake Road between 12 and 13 Mile Roads.

I had talked to the Office Manager, who also had the doctor on the phone during the conversation. She anticipated that it would take her about 20 minutes to type the letter that the doctor directed her to in order to have it brought here.

The Court: They can fax it. She can fax it.

Mr. Goldberg: They did not want to fax anything of this nature. But there is actually somebody there now that will immediately carry it with them here.

The Court: Fine.

Mr. Goldberg: And the information that they told me that would be I presume, in the records, that they had seen Mr. Wasim Wadie on two occasions. He has been diagnosed as schizophrenic, and that they will provide the course of medications and progress notes.

The Court: Okay, thank you.

That afternoon, defense counsel provided to the court the records of Pioneer Counseling Center and a letter addressed to the court dated that day, July 25, 2000, from psychiatrist Dr. Kishwar Tahir, stating that defendant “is currently seeing me at Pioneer Counseling Center,” and that defendant “should continue his current care.” The medical records of defendant’s psychiatric evaluation² on May 18, 2000, stated a diagnosis of paranoid schizophrenia and that

² Defendant’s psychiatric evaluation states under “Content”:

Paranoid schizophrenic

Refer to Dr. Tahir for evaluation

Speak to site director about referring to CMH.

The evaluation stated regarding defendant’s affect that he was depressed, anxious, and angry. Under “risk assessment” the evaluation stated “homicidal,” adding “with no specific intent just ‘angry.’” Under “Dynamic Formulation,” the evaluation stated:

18 yrs old Caucasian smoking marijuana excessively since couple of yrs. Decline in functioning. Paranoid. Suspicious, distorts perception involved in sexual allegations.

Under “Problems” the evaluation stated:

- 1) Bizarre beh poor impulse control
- 2) cannabis [sic] abuse

defendant was seen again on June 14, 2000, for medication review. Paranoid schizophrenia is defined in the DSM-IV³ as:

The essential feature of the Paranoid Type of Schizophrenia is the presence of prominent delusions or auditory hallucinations in the context of a relative preservation of cognitive functioning and affect. . . . Delusions are typically persecutory or grandiose, or both, but delusions with other themes (e.g., jealousy, religiosity, or somatization) may also occur. The delusions may be multiple, but are usually organized around a coherent theme. Hallucinations are also typically related to the content of the delusional theme. Associated features include anxiety, anger, aloofness, and argumentativeness. The individual may have a superior and patronizing manner and either a stilted, formal quality or extreme intensity in interpersonal interactions. The persecutory themes may predispose the individual to suicidal behavior, and the combination of persecutory and grandiose delusions with anger may predispose the individual to violence. Onset tends to be later in life than the other types of Schizophrenia, and the distinguishing characteristics may be more stable over time. These individuals show little or no impairment on neuropsychological or other cognitive testing. . . .

The records of defendant's psychiatric evaluation stated under "Plan of Care:"

[illegible] Zyprexa 15 mg HS

[decrease] cogentin 0.5 mg HS

[decrease] klonopin 1 mg HS

FU [follow up] in [illegible number] wks

TX thru Maple Grove [illegible]

The medication record states that defendant was prescribed Zyprexa and Cogentin on June 15, 2000. The Physicians' Desk Reference (PDR) Family Guide to Prescription Drugs states about Zyprexa:

Zyprexa helps manage symptoms of schizophrenia and other psychotic disorders. It is thought to work by opposing the action of serotonin and dopamine, two of the brain's major chemical messengers.

Regarding Cogentin, the PDR states:

Cogentin is given to help relieve the symptoms of "parkinsonism": the muscle rigidity, tremors, and difficulties with posture and balance that occur in

³ The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV).

Parkinson's disease and that sometimes develop as unwanted side effects of antipsychotic drugs such as Haldol and Thorazine.

Regarding Klonopin, the PDR states:

Klonopin is used alone or along with other medications to treat convulsive disorders such as epilepsy. It is also prescribed for panic disorder—unexpected attacks of overwhelming panic accompanied by fear of recurrence. Klonopin belongs to a class of drugs known as benzodiazepines.

The trial court stated on receiving the medical records that “[t]here’s no indication here that he is incompetent in any way.” Defense counsel renewed his request for a forensic referral, noting:

Mr. Goldberg: My argument, however, is that given the diagnosis of being paranoid schizophrenic and the medications that are being used to treat him. And given the manner in which Mr. Wadie has reacted during the course of this case over the last two days, his difficulty in following directions from me, discussing what I believe to be the important issues in this case with a priority being placed on the actual trial before the Court, as opposed to other collateral issues.

I’m feeling that Mr. Wadie should have the benefit of somebody from the Forensic Center evaluate him on the issue of competence.

The trial court again denied the request:

The Court: Sir I’ve already declined such a motion. I’ve reviewed the records, and I have made note of the fact that your client has been extremely well-behaved since being taken into custody and having the presence of the police officers in the courtroom. Somehow he may have some mental problems, but he is definitively competent.

Mr. Goldberg: Your Honor may the records I tended [sic] to the Court be a part of the court file?

The Court: Certainly.

Defense counsel again raised the issue of defendant’s competence during the prosecution’s case on the fourth day of trial (July 28, 2000):

Mr. Goldberg: My client, Husam [sic] Wadie – I’ve been trying to communicate with him again today. He is still not able to get his medications. I still believe him to be decompensating. The only thing he’s been able to tell me today is, Judge – just tell the Judge I didn’t throw any rocks. He’s not able to focus on what the trial is. He’s been of absolutely no assistance in that regard. And he seems to think that all I have to do is ask the Court to let him out or

dismiss that case, and that somehow that would happen, despite my telling him that that cannot happen.

The Court: Mr. Goldberg, I can't help but notice that since he's been in custody there's been no inappropriate behavior emanating from that table.

Mr. Goldberg: There has been actually some this afternoon, your Honor.

The Court: On this?

Mr. Goldberg: That's why I'm bringing it to the Court's attention. Some of the remarks that were said, and some of the reactions. I think that – I'd rather – my client wants me to ask you something. I'd rather not.

The Court: Okay. Thank you. Bring in the jury.

“A claim of incompetency to stand trial, and the right to a competency determination, implicates constitutional due process protections. Issues of constitutional law are reviewed de novo.” *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000).

A criminal defendant is presumed competent to stand trial absent a showing that he is incapable because of his mental condition of understanding the nature of the proceedings against him or of assisting in his defense in a rational manner. MCL 330.2020(1); *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000); *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). A defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his competency. *Harris, supra* at 102. “An incompetent defendant ‘shall not be proceeded against while he is incompetent.’” *Id.*, quoting MCL 330.2022(1).

We agree with defendant that the record evidence adequately supported that there was a genuine question whether defendant was unable to assist in his own defense. The trial court did not address the second prong of a competency determination – defendant's capacity of assisting in his own defense, but rather, seemed to focus on defendant's ability to understand the proceedings and the court's perception that defendant's deportment before the jury improved once his bond was revoked. However, defendant's behavior, counsel's representations regarding his ability to communicate with defendant, and the medical records, which described defendant's diagnosis of paranoid schizophrenia, supported defense counsel's request for a forensic evaluation of competency.⁴

There was sufficient question whether defendant was able to assist in his defense in a rational manner to create a bona fide doubt regarding his competency. MCL 330.2026(1) provides in pertinent part:

⁴ While the trial court found it significant that defendant's medical records did not state that defendant was incompetent, the records were not submitted to establish defendant's incompetence, but to support the request that a competency evaluation take place. Nowhere was it suggested that the psychiatrist then treating defendant had, in his two visits with defendant, investigated defendant's legal competency to stand trial.

Upon a showing that the defendant may be incompetent to stand trial, the court shall order the defendant to undergo an examination by personnel of either the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of incompetence to stand trial.

“Whether [a] defendant is competent to stand trial is an ongoing concern of the court, and the issue of competence may be raised at any time during or after trial.” *People v Garfield*, 166 Mich App 66, 74; 420 NW2d 124 (1988); MCR 6.125(B)⁵ (“issue of competence to stand trial may be raised at any time during the proceedings against the defendant”). Under MCR 6.125(C), “[o]n a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry.” Defendant made such a showing here, yet the trial court failed to order a forensic exam. We agree with defendant that the ability to assist in one’s defense goes beyond the ability to maintain proper deportment before the jury. We remand for a nunc pro tunc competency hearing. See *People v Vokes*, 134 Mich App 62; 349 NW2d 819 (1984).

Remanded as to defendant Wasim Husam Wadie for further proceedings consistent with this opinion. We do not retain jurisdiction.

Affirmed as to defendant Manhal Wadie.

/s/ Richard Allen Griffin
/s/ Helen N. White
/s/ Christopher M. Murray

⁵ MCL 330.2024 provides that the issue of incompetence to stand trial “may be raised by the defense, court, or prosecution. The time and form of the procedure for raising the issue shall be provided by court rule.”